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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1954

No. 616

EDWARD J. SHAUGHNESSY, DISTRICT DIRECTOR OF THE IMMIGRATION AND NATURALIZATION SERVICE, NEW YORK DISTRICT, DEPARTMENT OF JUSTICE,

Petitioner,

v.

UNITED STATES OF AMERICA, EX REL. JOSEPH ACCARDI

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT

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EDWARD J. SHAUGHNESSY, District Director of the Immigration and Naturalization Service, New York District, Department of Justice,

Petitioner,

v.

UNITED STATES OF AMERICA, EX REL. JOSEPH ACCARDI

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

Opinions Below

The opinion of the Court of Appeals (R. 197) is reported at 219 F. 2d 77 and the District Court's opinion (R. 188) is not reported.

Jurisdiction

The judgment of the Court of Appeals was entered on January 7, 1955, and a writ of certiorari was granted on

March 14, 1955. This Court's jurisdiction is invoked under 28 U. S. C. 1254(1).

Questions Presented

1. Did the Court of Appeals properly decide that respondent did not have a fair and open hearing in his deportation case before the Board of Immigration Appeals as is required by regulations and this Court's decision (347 U. S. 260) where documentary and undisputed evidence establish:

(a) That the Attorney General had a program to deport 100 alien racketeers which he announced in press releases and through the newspapers (R. 135, 148, 160).

(b) That the Attorney General decided in November 1952, *ex parte* and while the case was pending before the Board of Immigration Appeals that respondent was a racketeer (R. 137, 74) and thereafter included him within the program (R. 137, 141).

(c) That the Attorney General "moved to deport" Accardi while his case was pending upon appeal before the Board of Immigration Appeals (R. 141).

(d) That prior to April 3, 1953, the Board of Immigration Appeals was aware of the character of the Attorney General's program only through press releases and newspaper accounts (R. 104, 106).

(e) That prior to its decision herein the Board of Immigration Appeals was advised confidentially that the respondent was a racketeer or undesirable included within the Attorney General's program (R. 189, Finding 5; 109-110).

(f) That the Department of Justice announced on April 3, 1953, when releasing the opinion of the Board of Immigration Appeals, that the respondent was ordered deported under the Attorney General's current program against top racketeers (R. 149-150)?

2. Did the documentary evidence herein establish that the respondent had an unfair hearing before the Board of Immigration Appeals?

3. Did the Court of Appeals properly decide that the District Court's decision was in conflict with this Court's prior ruling herein and the documentary evidence that the Attorney General's program was one to deport?

4. Is further review appropriate by this Court to weigh the force and effect of the documentary and other proof herein?

Statutes and Regulations Involved

Section 19(c) of the Immigration Act of 1917 [62 Stat. 1206; 8 U. S. C. 155 (c)], as amended provides in pertinent part as follows:

> "In the case of any alien (other than one to whom subsection (d) is applicable) who is deportable under any law of the United States and who has proved good moral character for the preceding five years, the Attorney General may (1) permit such alien to depart the United States to any country of his choice at his own expense in lieu of deportation, or (2) suspend deportation of such alien if he is not ineligible for naturalization or if ineligible such ineligibility is solely by reason of his race, if he finds (a) that such deportation would result in serious economic detriment to a citizen or legally resident alien who is the spouse, parent, or minor child of such deportable alien; or (b) that such alien has resided continuously in the United States for seven years or more and is residing in the United States upon the effective date of this Act."

8 C. F. R. 90.3 (1949 Ed.) provides in part:

> ". . . appeals shall lie to the Board of Immigration Appeals where orders, whatever their nature . . . arise in: . . . (2) Deportation proceedings . . ."

8 C. F. R. 90.12 (1949 Ed.) provides in part:

"The Board of Immigration Appeals shall refer to the Attorney General for review of the Board's decision all cases which:

(a) The Attorney General directs the Board to refer to him;

(b) The chairman or a majority of the Board believes should be referred to the Attorney General for review of its decision;

(c) The Commissioner requests be referred to the Attorney General by the Board and it agrees."

8 C. F. R. 150.7 (b) (1949 Ed.) provides in part as follows:

"*Eligibility for departure in lieu of deportation or for suspension of deportation.* If the alien has applied for the privilege of departure in lieu of deportation or for suspension of deportation * * * the presiding inspector shall follow his conclusions of law as to the alien's deportability with a discussion of the *evidence* relating to the aliens eligibility for such relief and his reasons for his proposed order. * * *"

8 C. F. R. 151.2 (c); 1951 Supp. reads in part:

"*Hearing officer: specific duties.* * * * the hearing officer shall thereafter present all available evidence, including the interrogation of the alien and all witnesses presented concerning * * * (4) factors bearing upon statutory eligibility for discretionary relief, * * *"

8 C. F. R. 151.5 (1951 Supp.) provides in part as follows:

"*Decision—(a) Preparation of written decision.* * * * the hearing officer shall, as soon as practicable after the conclusion of the hearing, prepare in writing

a decision, signed by him, which shall set forth a summary of the evidence adduced and his findings of fact and conclusions of law as to deportability. If the alien has applied for relief from deportation, the decision shall also contain a separate determination as to whether or not the hearing officer is satisfied, on the basis of the evidence presented, as to the alien's statutory eligibility for the relief requested. * * * The hearing officer shall have no authority to exercise the Attorney General's powers under section 19 (c)(2) of the Immigration Act of 1917, as amended, or under the seventh proviso to section 3 of that act * * *".

Section 405(a) of Public Law 414 (66 Stat. 280), known as the Immigration and Nationality Act of 1952 provides:

"Nothing contained in this Act, unless otherwise specifically provided therein, shall be construed to affect the validity of any * * * proceedings * * * done or existing at the time this Act shall take effect; but as to all such * * * proceedings * * * the statutes * * * repealed by this Act are, unless otherwise specifically provided therein, hereby continued in force and effect. * * * An application for suspension of deportation under section 19 of the Immigration Act of 1917, as amended, * * * which is pending on the date of the enactment of this Act, shall be regarded as a proceeding within the meaning of this subsection."

Statement

Respondent, Joseph Accardi, has been ordered deported on the ground that he entered the United States in 1932 without a visa (R. 2, Par. 4). The Board of Immigration Appeals' opinion herein (R. 184) and the respondent's testimony (Immigration File, Minutes pp. 10, 25) reveal that the only adverse factors in respondent's record were

two arrests in 1933 and 1934 which did not result in convictions and a 1941 suspended sentence for violation of 18 U. S. C. 88 (R. 184). There is no record evidence indicating that he is a racketeer (R. 121). The allegation of respondent's good moral character for the past ten years (R. 3, Par. 7) is not only unopposed, but is corroborated by a favorable finding in the decision of the Board of Immigration Appeals, dated April 3, 1953 (R. 183, 184). Notwithstanding his good moral character, his long residence here and his family ties, the Board without assigning reasons, refused to exercise discretion to permit respondent to remain in the United States as a permanent resident (R. 2, Par. 4). The instant application for habeas corpus alleges:

> 1. That the Attorney General maintains a confidential file relative to respondent, that the Government has included his name on a secret purge list, and that because of confidential information and other matters outside the record, including the proscribed listing of his name by the Attorney General on October 2, 1952, respondent was ordered deported in 1953 (R. 3, 4, Par. 11-16).
>
> (2) That the Attorney General decided to deport respondent in October of 1952, and accordingly, the case was prejudged in advance of the Board's decision of April 3, 1953 and that respondent was denied fair consideration of his case (R. 5, Par. 19). This Court held that these allegations state a cause of action (347 U. S. 260).

The Government in its return to the writ herein admitted that Accardi was included within the special program of the Attorney General (R. 15, Par. 12 and R. 45).

After the Court's decision herein (347 U. S. 260) and a year after the filing of this action, the Attorney General's

office announced on April 23, 1954, that the deportation program was, contrary to this Court's views, one "publicly announced to proceed with vigor against aliens" in the undesirable class and that "effectuation of the program has been, and continues to be, the responsibility of those charged with prosecuting duties" (R. 17-18).

Thereafter, all Government witnesses except former Attorney General McGranery contended that the deportation program was solely one to expedite, and they embellished upon the fact that expedition alone was its origin and purpose.

It was contended in petitioner's return (R. 15, 16, Par. 12-14), in sworn oral testimony of the Chairman of the Board of Immigration Appeals (R. 105), and in affidavits filed herein and responses to interrogatories (R. 24, 46) that the Attorney General's program was solely one to expedite cases rather than to deport. It was asserted that the program was one

> "intended to prevent unnecessary delays occasioned or tolerated through negligence or indifference of officials charged with the responsibility of carrying out enforcement measures provided for by statute," (R. 24).

It was said that:

> "The Attorney General of the United States in the fall of 1952 commenced a program designed to give expeditious attention to the more serious cases on a priority basis" (R. 22).
>
> "The program of the Attorney General is not a program to deport, but a program to expedite the consideration of deportability" (R. 46).

It is now contended that statements in various press releases and public announcements relating to the Attorney

General's program "throughout refer to vigor in prosecution" of cases (Gov't Brief p. 30) rather than to a program to deport.

Former Attorney General McGranery, however, testified to the contrary. He stated that he became convinced that "undesirable persons engaged in racketeering were dominating, in some cases, political parties in metropolitan areas" and that the program was motivated by this thought (R. 136, 138). He further testified that his "deportation program" was aimed at "ridding the nation of undesirable aliens engaged in racketeering and other criminals activities" (R. 136-137).

Petitioner also claimed that the Board was not aware that Accardi was within the Attorney General's program at the time of its decision (R. 55), and accordingly, that it could not have been influenced by it.

The matter came on for hearing upon the writ before District Judge McGohey on June 23, 1954. Documentary evidence and depositions of six witnesses were received in evidence. Only one witness testified orally (R. 102). Judge McGohey rejected the Government's contention that the Board was not aware that Accardi was within the program at the time of its decision (R. 189, Finding 5). He did, however, rule that notification that Accardi was within the program was merely a request to expedite and, therefore, that Accardi had a fair hearing before the Board (R. 189, Finding 3).

The Court of Appeals recognized that this Court had held in its previous decision that:

> ". . . public announcements clearly reveal that the Attorney General did not regard the listing as a mere preliminary to investigation and deportation; to the contrary, those listed were persons whom the Attorney General 'planned to deport.' "

It further observed that in addition to the public announcement, Attorney General McGranery's testimony (R. 136 *et seq.*) "amply supports the Supreme Court's interpretation" (R. 199). Whether the program was one to expedite cases or to deport was the core of the dispute in the Courts below. The majority of the Court of Appeals held, upon the basis of the documentary evidence and the Attorney General's testimony that the District Court's ruling adverse to respondent was clearly erroneous (R. 204). The dissenting opinion concluded that it was not (R. 215).

A

This Court's Previous Decision

When the instant case was previously presented to the Supreme Court, the Acting Solicitor General submitted to the Court the documents which comprise Exhibit 2 herein (R. 147). These exhibits constituting official press releases of the Department of Justice may be summarized as follows:

> *October 2, 1952:* The Attorney General announces his special drive to deport alien racketeers.
>
> *April 3, 1953:* Announcement of Board of Immigration Appeals order of deportation against Joseph Accardi "known as a New Jersey racketeer". This action was taken "under the current denaturalization and deportation program of Attorney General Brownell against top racketeers and subversives."
>
> *April 30, 1953:* Announcement of apprehension of Joseph Accardi, "Newark, N. J. racketeer" for deportation on April 24, 1953.
>
> *May 11, 1953:* Announcement of denial by Board of Immigration Appeals of motion by Joseph Accardi, "Newark, New Jersey racketeer, for reopening of his deportation case."

May 20, 1953: Release of speech of May 19, 1953 by Attorney General Brownell before the Stark County Division, Ohio Republican Finance Committee Dinner at Canton, Ohio. At page 8 of speech, the Attorney General stated:

"But here are a few examples of the thousands of decisions and actions the Department of Justice may be called upon to make in a single day: * * * to initiate deportation proceedings against undesirables like Joseph Accardi * * *".

September 29, 1953: Deputy Attorney General Rogers announces at the Annual Conference of District Directors of the Immigration and Naturalization Service that the number of racketeers against whom deportation and denaturalization proceedings have been brought has increased from 96 to 131.

October 30, 1953: Address of Assistant Attorney General in charge of the Criminal Division before the Chicago Crime Commission (pp. 10-11):

"The second area is one in which the Department of Justice has not only primary but exclusive jurisdiction —the field of denaturalizing and deporting gangsters and racketeers, who are foreign born and who because of their criminal activities, can make no claim to remain in the United States while violating its laws. * * * To name but a few of the nationally known hoodlums who are the object of the program * * * Joe Accardi * * * and Joe Adonis of New York, have * * * been ordered deported."

Upon the basis of the foregoing this Court observed (347 U. S. at 267):

"Public announcements clearly reveal that the Attorney General did not regard the listing as a mere preliminary to investigation and deportation; to the

contrary, those listed were persons whom the Attorney General 'planned to deport' . . . In fact, the Assistant District Attorney characterized it as the 'Attorney General's proscribed list of alien deportees'. To be sure, the petition does not allege that the 'Attorney General ordered the Board to deny discretionary relief to the listed aliens'. It would be naive to expect such a heavy-handed way of doing things."

B

Summary of Pleadings

1. *The Petition* (R. 5), asserts that the respondent was not accorded a fair hearing before the Board of Immigration Appeals as noted above.

2. *The Return to the Writ* herein (R. 10), acknowledges that Accardi was within the Attorney General's program but contends that the program was merely intended "to prevent unnecesary delays". "No written instructions of any kind were issued at the inception of the program as to its scope or intent." (R. 17).

3. *Affidavit of Lester Friedman, May 10, 1954.* "The Attorney General of the United States in the fall of 1952 commenced a program designed to give expeditious attention to the more serious cases on a priority basis" . . . The program of the Attorney General "is a program intended to prevent unnecessary delay . . ." "Obviously all cases within the Attorney General's program have some unfavorable or unsavory factors in their background which make it more difficult for them to establish the type of merit which would warrant granting of discretionary relief." (R. 22, 26).

4. *Response to Interrogatories* (R. 43). The Attorney General's program was not one to deport but one to expedite cases (Response Nos. 2, 13). The Board of Immigration

Appeals received press releases of the Department of Justice (Response No. 42). It was rare to grant favorable relief in program cases (Response No. 38). Attorney General Brownell continued the program of Attorney General McGranery (Response No. 21). Assistant United States Attorney William Sexton acknowledged that Joseph Accardi was on the list of alien deportees (Response No. 9).

5. *Supplemental Response to Interrogatories* (R. 54). The Board of Immigration Appeals did not know that Accardi was added to the program at the time of its decision.

C

Summary of the Evidence

1. *Deposition of former Attorney General James P. McGranery.* (Exhibit 1, R. 134). Mr. McGranery testified that he became convinced that "undesirable persons engaged in racketeering were dominating, in some cases, the political parties in metropolitan areas" (R. 138) and accordingly on October 2, 1952, he announced a program, accurately reflected by Exhibits 2, 4, 5, 6, and 7 herein (R. 135, 136). Exhibit 2 (R. 148) is the official announcement of Mr. McGranery's program declaring that "appropriate action will be taken against unsavory characters who have continued to be aliens technically as well as in the broader sense . . . the execution of this plan will do much to destroy the roots of organized crime in America." Exhibits 4, 5 and 6 (R. 161-165), are newspaper items which Mr. McGranery asserted accurately reflected his program. They announce that "U. S. plans to deport 100 alien racketeers" (R. 161); "McGranery opens drive to deport 100 alien figures in underworld" (R. 165) and "McGranery disavows political motives in moves to deport 100 naturalized citizens, aliens" (R. 163).

Exhibit 7 (R. 166) is a December 8, 1952 press release announcing the arrest of Jack Dragna for deportation. It recites "The arrest, Mr. McGranery said, was another step in his denaturalization and deportation program aimed at ridding the Nation of undesirable aliens engaged in racketeering and other criminal activities." Mr. McGranery acknowledged that this press release accurately reflected his program (R. 136).

Mr. McGranery further acknowledged while the case of respondent was before the Board, he became satisfied that Accardi was a racketeer, and he thereupon placed him on his racketeer list (R. 137), that:

> "My investigation of Accardi indicated that he was a racketeer and that is the reason I moved to deport him." (R. 141).

2. *Deposition of Michael Horan* (R. 73). Mr. Horan testified that he is a Special Assistant to the Attorney General and that he was concerned with the program of Attorney General McGranery; that it was handled by a co-ordinating committee consisting of a Mr. Dunnigan, himself, and representatives of the Immigration Service, the Federal Bureau of Investigation and the Criminal Division. On November 19, 1952 (prior to oral argument of the case before the Board) Joseph Accardi's name was added to the program upon recommendation of the Immigration Service. Thereafter, from November 1952 through April 3, 1953, all these representatives received weekly progress reports on the case (R. 80). During this entire period of seventeen weeks or more the case was before the Board of Immigration Appeals.

3. *Depositions of Board Members Charles, Nettleton, Wilson and Ludwig* (R. 56). Miss Wilson and Mr. Ludwig testified that they became aware of the Attorney General's

program through the press (R. 59). Mr. Nettleton testified that he may have become aware of the program through the press and Mr. Charles at first testified that he could not answer the question (R. 58) but later acknowledged that he obtained knowledge of the program from newspapers (R. 68). Board Member Ludwig who heard oral argument on the Accardi case (R. 123) acknowledged that he saw Exhibit 7, (R. 61) which described the Attorney General's program as one "aimed at ridding the Nation of undesirable aliens engaged in racketeering" and admitted that he was aware that Accardi was within the Attorney General's program at the time of the Board's decision (R. 69). Board members Nettleton and Wilson did not recall whether they knew Accardi was within the program (R. 69). Mr. Charles and Mr. Nettleton had no recollection whether there was a Board conference on the case prior to the Board's decision on April 3, 1953, and Board Members Wilson and Ludwig stated they believed there was such a conference (R. 70).

4. *Oral testimony of Board Chairman Thomas G. Finucane.* Mr. Finucane testified that the Accardi case was certified to the Board in July, 1952, that he became aware of the Attorney General's program of October 2, 1952 through the Evening Star and Washington Post [Exhibits 4 and 5; R. 104] that the Board received the various press releases of the Department of Justice and that the normal practice was to circulate them among the Board Members (R. 104). He asserted that the Attorney General's program was not "a drive to expel racketeers and other undesirables" (R. 111) and that after interrogating the other Board Members he ascertained that no Board Member had any knowledge in April 1953 that Accardi was within the Attorney General's program (R. 128). [Compare contrary testimony of Board Member Ludwig—R. 69].

He acknowledged that the Accardi case was argued on No-

vember 26, 1952, that a request had been received from the Press Division in the Department of Justice for the Accardi decision prior to April 3, 1953, and that it was usual for such requests to be made in program cases (R. 114-117). He further admitted that prior to April 1953 a practice had grown up to notify the Board of program cases orally or in writing, that such notifications were *ex parte* and confidential and that they in form did not request expedition but merely stated that the case was within the Attorney General's program (R. 109, 111). It was admitted however, that when Accardi applied for reconsideration of his case, it was known that the Attorney General considered him a racketeer (R. 12).

5. *Exhibit 3* is the transcript of hearing herein before Judge Clancy wherein Assistant United States Attorney Sexton admits, as noted by the Supreme Court, that Accardi was on the list of alien deportees.

6. *Exhibits 7A to 7C* (R. 166-170) are press releases of the Department of Justice issued under Attorney Generals McGranery and Brownell on December 18, 1952, May 19, 1953 and May 8, 1953 and noting the "drive" or "program" of the Attorney General "against undesirable aliens engaged in racketeering and other criminal activities."

7. *Exhibits 8A* (R. 171) is an excerpt from the 1952-1953 Annual Report of the Immigration Service referring to the "Attorney General's special program for intensifying efforts looking toward the deportation and denaturalization of subversives, criminals, racketeers, narcotic law violators, and others who have demonstrated that their presence is inimical to the United States."

8. *Exhibit 2*, consisting of the various press releases and speeches of the Department of Justice and summarized in Point A supra.

Summary of Argument

I

In the secrecy of his chambers and while the respondent's case was pending on appeal before the Board of Immigration Appeals, the Attorney General made an *ex parte* determination that Accardi was a racketeer (R. 137) and "moved to deport" him (R. 141)—contrary to the law as set forth by this Court in its prior consideration herein. The views of the Attorney General were made known to the Board by press releases and newspaper accounts—all of which leave no doubt that his program was one to deport designated aliens and not merely to expedite the consideration of their cases. (R. 36, 148, 160-167). No other source of knowledge as to the program was available to the Board prior to April 3, 1953, the date it decided this case. (R. 104). That Accardi was within the program and thus marked for deportation was made known to the Board by a confidential communication which interfered with its impartial consideration of the case. (R. 109-110, 189; Finding 5). To be sure—the Attorney General did not order to Board to deport Accardi by a direct communication but his views were made known through official press releases which the Board received (R. 104) and by a confidential message that Accardi was within the program. It would be naive as noted by this Court (347 U. S. at 267) to expect the Attorney General to issue a direct order.

II

The documentary proofs establish that Accardi was denied the fair hearing to which this Court declared he was entitled. The Court of Appeals properly evaluated the case below since the issue is not one of credibility but of the controlling weight to be given to deposition testimony and contemporaneous documentary evidence. *United States* v.

United States Gypsum Co., 333 U. S. 364 (1947); *Orvis* v. *Higgins*, 180 F. 2d 537 (C. A. 2, 1950). An appellee court may evaluate the force and effect of such testimony as well as a district judge. *Luckenbach* v. *United States*, 157 F. 2d 250 (C. A. 2, 1946).

There is no dispute that Accardi was within the Attorney General's program and that the Board was aware of this fact. (Govt. Brief p. 25, R. 189, Finding 5). The petitioner however, insists that statements in various press releases and public announcements relating to the Attorney General's program "throughout" refer to "vigor in prosecution" of cases rather than a program to deport. (Gov't Brief p. 30). It was upon this conception of the press releases and public announcements—the sole source of the Board's knowledge prior to April 3, 1953—and the claim that the Board members were unaware of the Accardi listing (R. 55, 110) that the Board asserted the independence of its decision.

The supporting props for this claim of independence were not only challenged but were completely demolished. The District Court found that the Board was in fact aware of the Accardi listing. (R. 189, Finding 5). The assertion that the program was conceived and carried out solely in the interest of fair-minded expedition of cases was likewise discredited. Not a single press release or announcement prior to the Board's decision of April 3, 1953 speaks of vigor in the prosecution or expedition of cases. The claim that the program was originated because of a backlog of cases (R. 24) was refuted by former Attorney General McGranery. This Court in its decision herein noted that the program listed aliens who were marked for deportation. (347 U.S. at 267). Moreover, Mr. McGranery freely acknowledged that while this case was pending before the Board, he moved to deport Accardi after first deciding *ex parte* that he was a racketeer. The Board thereafter received a confidential communication

which did not request expedition but advised that Accardi was within the program (R. 109-110; 189)—a communication which marked Accardi an undesirable alien. Finally, the Department of Justice acknowledged that Accardi was ordered *deported* by the Board pursuant to the program. (R. 149-150). The Board read the press releases and the public announcements relative to the Attorney General's program. It should therefore be charged with the understanding that reasonable men would draw from such documents issued prior to April 3, 1953. *Avery* v. *Commissioner of Internal Revenue*, 22 F. 2d 6, 7. (C.A. 7, 1927). The Board members are accordingly charged with knowledge that the Attorney General desired to deport 100 alien racketeers (R. 160-167), that he considered Accardi a racketeer (R. 189, Finding 5) and desired to deport him. Prejudgment is clearly established on this record.

III

Immigration regulations applicable to this case require that an application for suspension of deportation be decided on the record evidence. *Alexiou* v. *McGrath*, 101 F. Supp. 421 (Dist. of Col., 1951). The confidential advice given to the Board that Accardi was within the program—admittedly an adverse factor, tainted the case with unfairness and rendered the Board's decision void. *Alexiou* v. *McGrath, supra.*

IV

The Attorney General's conduct herein was that of a conscious militant participant in the creation of adverse publicity against program cases. Each case was customarily the subject of a press release (R. 74). As in *Delaney* v. *United States*, 199 F. 2d 107 (C.A. 1, 1952) an atmosphere was created (here by the Department of Justice itself) which prevented fair, open, and impartial consideration of Accardi's case which the regulations and due process guaranteed to

respondent. The tampering with the Board—by confidential communications of an adverse nature should presumptively be deemed as prejudicial—if not more so, than the situation presented in jury cases where the nature of the communication might be unknown. See *Remmer* v. *United States*, 347 U.S. 227 (1954).

Fairness accordingly was denied to respondent by prejudgment, by improper adverse publicity and by an improper confidential communication to the Board.

I

The Court of Appeals Was Authorized to Evaluate the Evidence and Reverse the District Court Insofar as the Latter's Findings Were Either (1) Clearly Erroneous or (2) In Conflict With Contemporaneous Documentary Proofs

It is clear that under Rule 52(a) of the Rules of Civil Procedure, findings of fact which are clearly erroneous may be reversed by the Court of Appeals. *United States* v. *United States Gypsum Co.*, 333 U.S. 364, 356 (1947).

Where as, here, the Government's contentions and the District Court's findings are challenged by contemporaneous documentary evidence, appellate courts are as free to decide the case as the District Court.

Unlike *United States* v. *Oregon Med. Soc.*, 343 U.S. 326 (1952) this is not an appeal from an issue of fact where appellate courts rely exclusively upon determinations of district judges upon issues of credibility. Where documentary proofs or depositions are the primary source of evidence, the appellate court may substitute its judgment for that of the District Court. In the instant case six witnesses testified through deposition. Only one witness testified orally. The balance of the case was documentary. The applicable

rule is set forth by Judge Frank in *Orvis* v. *Higgins*, 180 F. 2d 537 (C.A. 2, 1950) where it was said at page 539:

> (a) "If he (The District Judge) decides a fact issue on written evidence alone, we are as able as he to determine credibility, and so we may disregard his finding.
>
> (b) Where the evidence is partly oral and the balance is written or deals with undisputed facts, then we may ignore the trial judge's finding and substitute our own, (1) if the written evidence or some undisputed fact renders credibility of the oral testimony extremely doubtful, or (2) if the trial judge's finding must rest exclusively on the written evidence or the undisputed facts, so that his evaluation has no significance. . . ."

See Also: *Fritz* v. *Jarecki*, 189 F. 2d 445 (C.A. 7, 1951)

Where evidence is taken by deposition the same rule is applicable and the Court of Appeals is "as well able as the trial judge to appraise credibility of the witnesses and draw inferences from their testimony." *Luckenbach* v. *United States*, 157 F. 2d 250, 251 (C.A. 2, 1946). See also: *Kind* v. *Clark*, 161 F. 2d 36, 46 (C.A. 2, 1947); *The Coastwise Transp. Corp.* v. *Charles Nelson Co.*, 68 F. 2d 720 (C.A. 2, 1934); *Norment et al* v. *Stilwell*, 135 F. 2d 132 (C.A. 2, 1943); *Equitable Life Assurance Co.* v. *Irelan*, 123 F. 2d 462, 464 (C.A. 9, 1941); *Pfeifer Oil Transp. Co.* v. *The Ira S. Bushey*, 129 F. 2d 606 (C.A. 2, 1942) and *Bowles* v. *Beatrice Creamery Co.*, 146 F. 2d 774 (C.A. 10, 1944).

In the instant case, the only oral testimony presented was that of Mr. Finucane (R. 102) an infinitesimal part of the case.

Obviously, the testimony of Mr. Finucane, the Board Chairman, was not controlling. Whether the Board was influenced by the Attorney General could only be determined

by evaluating the attitude of a majority of the Board who passed upon Accardi's case. As a majority of the Board testified through depositions, the Court of Appeals could determine credibility herein as well as the District Court.

II

The Government's Contention That the Attorney General's Program Was One to Expedite Cases Was Clearly Discredited

After this Court's decision herein, and more than one year after the institution of this litigation, notice was given on April 23, 1954, to all divisions in the Department of Justice, that the Attorney General's program "has been and continues to be, the responsibility of those charged with prosecuting duties." It was said, contrary to this Court's decision, that the program was one "publicly announced to proceed with vigor against aliens" in the undesirable class (R. 18). Thereafter, all Government witnesses contended that the program was one solely to expedite cases.

In its return (R. 15), Par. 12, Par. 14, and in the affidavit of Mr. Friedman of May 10, 1954 (R. 22) it is alleged that the Attorney General announced a program on October 2, 1952, designed to expedite cases because of the "accumulation of arrearages in much of the operation of the Service" (R. 21). Response to interrogatory 13 asserts that the program of the Attorney General is not a program to deport but a program to expedite the consideration of deportability and that such cases were expedited in the same manner as other cases which merited priority" (R. 46).

In its brief here (p. 30) the Government asserts that all public statements of the Attorney General with reference to his deportation program displayed "throughout" a concern solely for "vigor in the prosecution" of cases. Not a single press release or public statement prior to the Board's deci-

sion herein on April 3, 1953 reflect concern for the expedition of cases. (See Exhibits 2, 4-7A; R. 148, 160-167). They all speak of "deporting and ridding the nation of undesirable aliens engaged in racketeering" (R. 166) and it was this expression that former Attorney McGranery identified as accurately describing his program (R. 136). True, after this litigation was instituted on May 15, 1953 (R. 6) and after this Court's decision on March 15, 1954, an April 1954 Department of Justice memorandum was circulated contradicting this Court's views and describing the program as one solely concerned with vigorous prosecution. (R. 18). As Judge Clark observed, such instructions hardly constituted a timely withdrawal of the list. (R. 214).

The contention that the program was one to expedite cases rather than to deport is fantastic in the light of the record herein. Attorney General McGranery established a coordinating committee consisting of several representatives from the F.B.I., the Criminal Division, the Immigration Service, and the Deputy Attorney General's Office to administer the Attorney General's deportation program (R. 74 et seq., 138) and notification that a case was within the program was always secretly communicated to the Board of Immigration Appeals (R. 109-110). If expedition was the sole objective, why was secrecy required? Weekly reports were issued on each case to the Attorney General, the Deputy Attorney General, the F.B.I., the Criminal Division, and others (R. 80). If expedition were the sole aim of the program, it seems incredible that such elaborate secret machinery would be necessary. Was the Department of Justice and the Board of Immigration Appeals really concerned with expediting favorable as well as unfavorable consideration of cases whom the Attorney General had marked for deportation? The assertion that there were many aliens within the program who "have been the beneficiaries of favorable administrative action" (R. 51),

an assertion repeated in the petitioner's brief (p. 34), is completely refuted by the Chairman of the Board who stated that in all program cases the aliens had been directed to leave the country. (R. 119-120). To this may be added the admission that all program cases necessarily "have some unfavorable or unsavory background" rendering favorable action difficult. (R. 50) and the fact that every pertinent press release without exception announced the deportation of an alleged racketeer under the Attorney General's current program (R. 74, 149-150, 166, 167). Not a single press release spoke of expedition or favorable action in a program case.

We believe that the record evidence clearly refutes and discredits the contention that the program was one solely to expedite the consideration of cases.

Exhibit 2 herein (R. 146) contains press releases which were previously filed with this Court. The press release of Attorney General McGranery of October 2, 1952 (R. 148), announces that "appropriate action will be taken against the unsavory characters who have continued to be aliens technically as well as in the broader sense" and that "the execution of this plan will do much to destroy the roots of organized crime in America." The press release of April 3, 1953, (R. 149) announces, through Attorney General Brownell, that Joseph Accardi, known as a New Jersey racketeer, was ordered deported "under the current denaturalization and deportation program of Attorney General Brownell against top racketeers and subversives."

On the basis of these documents this Court observed:

> ". . . public announcements clearly reveal that the Attorney General did not regard the listing as a mere preliminary to investigation and deportation; to the contrary, those listed were persons whom the Attorney General planned to deport." 347 U. S. at 267.

This analysis of the press releases by the Court constitute the law of the case. *White* v. *Higgins*, 116 F. 2d 312 (C. A. 1, 1940); 65 *Harvard Law Review* 822 (1952); 5 *Stanford Law Review* 751 (1953) and is *res judicata*. *United States* v. *Moser*, 266 U. S. 236, 242 (1924).

But, what is more important, the additional documentary proofs and testimony herein, doubly reinforce this Court's conclusion.

Mr. McGranery testified that his program was not as the Government contends born as a result of an accumulation of arrearages, but on the contrary that it was conceived because "political organizations, particularly in the large metropolitan areas, were in some cases dominated by racketeers" (R. 136), and that it was as announced in the Jack Dragna press release of December 8, 1952 (Exhibit 7, R. 166) a program aimed at "deporting and ridding the nation of undesirable aliens engaged in racketeering and other criminal activities." (R. 136.) He further testified that while the Accardi case was on appeal to the Board of Immigration Appeals, he concluded that Accardi was a racketeer and he "moved to deport him" by placing him within the program (R. 141). Mr. Horan places this date at either November 19 or 20, 1952 (R. 79).

The statement by Mr. McGranery that he moved to deport Accardi during the time that the Board was deciding the case—an admission which cannot be distorted into a request for expedition—clearly made it unnecessary to prove the so called dramatic statement by the Commissioner that Accardi's case was hopeless because he was on the list of 100 (See: Gov't Brief pp. 10, 24, 31). The Attorney General's admission cannot be construed to mean that a decision was made to institute deportation proceeding against Accardi because that had already been done, and the case was in the final appellate stage administratively. It

could only mean, exactly what the words imply, that the Attorney General listed Accardi for deportation.

William Sexton, who formerly represented the Government in this litigation admitted in open Court that Accardi was on the "Attorney General's proscribed list of alien deportees." Response to Interrogatory No 9 (R. 45, 347 U. S. 267).

Mr. McGranery identified the newspaper accounts (Exhibits 4, 5 and 6) as accurately reflecting his program (R. 135). Mr. Finucane testified (R. 104) that he learned of Mr. McGranery's program by reading the Washington Post and Evening Star (Exhibits 4 and 5). Exhibit 4 is headlined "U. S. Plans to Deport 100 Alien Racketeers."

Exhibit 5 reads:

> "The Justice Department's drive to rid the country of some 100 naturalized citizens and aliens with underworld and other unsavory reputations is no sudden face-saving device for the Democratic Administration according to Attorney General McGranery."

Exhibit 6, the New York Times, likewise repeats that "McGranery starts a drive to deport Alien Racketeers * * * 100 gangsters involved." These exhibits name some six or seven specific individuals who were included within the Program. Exhibit 7 and 7A (R. 166, 167) were press releases, issued in December 1952, before the Board's decision herein and received by the Board. They confirm that the program was a "deportation drive." Exhibits 7B and 7C (R. 168, 169) as well as Exhibit 2 (R. 150) verify that Attorney General Brownell continued the program of his predecessor. The answer to Interrogatory 21 admits that the program was continued under Attorney General Brownell (R. 47).

The Annual Report of the Commissioner of Immigration

for the fiscal year ending June 30, 1953 (R. 171) describes the program as

> "the Attorney General's special program for intensifying efforts looking toward the deportation and denaturalization of subversives, criminals, racketeers, narcotic law violators, and others who have demonstrated that their presence is inimical to the United States."

No one who reads and analyzes the foregoing can find any language which justifies the belief that the Attorney General was concerned solely and merely with expedition or the removal of a back-log. As this Court declared and as Mr. McGranery admitted with reference to Joseph Accardi, those within the program "were persons whom the Attorney General planned to deport." 347 U.S. at 267.

III

The Finding that the Board Was Notified that Accardi Was Within the Attorney General's Program Solely to Expedite the Case Was, Clearly Erroneous

The District Court found that the purpose of notifying the Board that a case was within the Attorney General's program "was merely to indicate that the Attorney General desired expeditious consideration of the Appeal" and that the Board so understood it (R. 189, Finding 3).

This conclusion stems initially from the theory that the program was one to expedite cases—a contention refuted by the Supreme Court in the instant case and the documentary evidence herein (Point II, *supra*). It is likewise contrary to the deposition of Mr. McGranery (R. 136) and contrary to the Department of Justice press release of April 9, 1953 (R. 150) announcing that Accardi was being *deported* pursuant to the Attorney General's program.

Petitioner contends herein that its case in the Courts below presented unchallenged evidence that the Board of Immigration Appeals was not influenced by the Attorney General's program to "expedite cases" (Pet. 10). This is not true. The Government's case presented by interested witnesses, was not only challenged, but thoroughly discredited. Their interpretation as to the Attorney General's program, was not only contradicted by Mr. McGranery but also by contemporaneous documentary evidence.

The District Court commented that it accepted completely the testimony of Mr. Finucane, the Board's Chairman, which was neither shaken nor controverted. Yet, the District Court below found that the Board was aware that Accardi had been included within the Attorney General's program, (R. 189. Finding 5) contrary to the testimony of Mr. Finucane (R. 127). Mr. Finucane twice asserted that he interrogated the Board Members and that no Board Member had any recollection that Accardi was within the program (R. 110, 128). Board Member Ludwig, however, distinctly remembered that he was aware of Accardi's inclusion within the Attorney General's program (R. 69). And, Mr. Finucane testified that the Attorney General's program was not one to deport racketeers (R. 111) contrary to the deposition of Mr. McGranery (R. 135, 136), press releases (R. 166), and newspaper accounts identified by Mr. McGranery as accurate (R. 135). Mr. Finucane admitted that these newspaper accounts and press releases were received and read by him (R. 104), and that they were the sole source of knowledge of the program prior to April 3, 1953 (R. 106). A man is presumed to know what a reasonable person ought to know from facts brought to his attention. *Avery* v. *Commissioner of Internal Revenue*, 22 F. 2d 6, 7 (C.A. 7, 1927). Having read the press releases and newspaper accounts, Mr. Finucane "was under obligation to contradict the impression they must have cre-

ated." *Kind* v. *Clark*, 161 F. 2d 36, 46 (C.A. 2, 1947). Nowhere did Mr. Finucane or any other government witness explain the basis for the impression that the program was one to expedite rather than deport—an impression which no one could gather from the contemporaneous announcements of Mr. McGranery. These announcements must be understood to convey the language utilized in their ordinary and popular sense. The documentary proof herein of the program, if inconsistent—as it was—with the oral testimony of Mr. Finucane—must be given controlling weight. *Sachs* v. *Ohio Nat. Life Ins. Co.*, 148 F. 2d 128 (C.A. 7, 1945) cert. denied 326 U.S. 753; *Symington Co.* v. *National Malleable Casting Co.*, 250 U.S. 383 (1919). Where oral testimony "is in conflict with contemporaneous documents, we can give it little weight, particularly when the crucial issues involve mixed questions of law and fact." *United States* v. *United States Gypsum Co.*, 333 U.S. 364, 396 (1947).

The basis for concluding that the Board was not influenced by the Attorney General's program was *first* the claim, that the program was considered merely one to expedite. Rejection of this contention requires rejection of the Board's claim that it was not influenced by notification that Accardi was within the program. *Secondly*, it was asserted that the Board was not influenced because it did not know that Accardi was within the program (R. 55). This claim was rejected by the District Court (R. 189, Finding 5). With these two contentions discredited, the factual basis for the Board's testimony that they were not influenced by the program is removed. This is supplemented by the testimony of Mr. McGranery.

Mr. McGranery frankly states that while the case was pending before the Board, he made up his mind that Accardi was a racketeer and he "moved to deport him" (R. 141).

It is undisputed that Accardi was placed within the program on November 19, 1952, while the case was pending before the Board and before it was argued orally on November 26, 1952 (App. 79, 181). It is undisputed that Mr. Sexton admitted that Accardi was on the list of alien deportees (R. 45), and that the Department of Justice announced on April 3, 1953, *that Accardi was ordered deported pursuant to the Attorney General's program* (R. 150).

It is clear therefore that the Attorney General did—just what the petition alleges and the Supreme Court denied him the right to do. He prejudged the case. Why? Mr. McGranery, notwithstanding the regulations, believed, of course in perfectly good faith—that he had the right to do it. For in his deposition he stated: (R. 142).

> "Frankly, I can't get your point. I don't see what you are driving at. The Immigration Board of Appeals is the Attorney General."

When Mr. McGranery placed Accardi within his program, he did so to deport him as his testimony reveals (R. 141). Notice of this fact was communicated to the Board while the case was still pending. (R. 189, Finding 5). There was then, in 1952, no basis whatsoever for the Board to conclude that it was mere expedition that the Attorney General desired and in fact, the Board did not expedite the case—on the contrary decision in the case was delayed from November 1952 when Accardi was listed within the program until April 1953 when the case was decided.

Moreover, the findings of the District Court completely ignore the manner of notification. The Board was notified that an alien was within the program *ex parte* and without notice to the other side. The notification was confidential. It did not request expedition but merely advised the Board that

a person was within the Attorney General's program (R. 110). The typical notification was as follows (R. 109-110):

Memorandum

From: Mr. Rawitz.
To: Thomas G. Finucane. Re: (alien's name).

Confidential

I have just been informed that the above named alien has been placed on the Attorney General's list.

Confidential

The express language of the notification was therefore a communication that a person was included within the class of unsavory characters or racketeers whom the Attorney General desired deported. The Government admits, as it must, that no alien with a clear record, was the object of the program (R. 50).

If this notification conveyed any meaning, it was that the Attorney General had a program to deport, as Point II demonstrates, and that Accardi was one of the individuals the Attorney General desired to deport. Contrary to the express language of the notification, the District Court found that the notification merely requested expedition.

Here we do not have a general preliminary revocable opinion formed by an agency in advance of open notice of the charge, followed by an opportunity to rebut it and cross-examine thereon as was involved in *Federal Trade Commission* v. *Cement Institute*, 333 U.S. 700-703 (1948). Here too, unlike *Federal Trade Commission* v. *Cement Institute*, *supra*, and *Fahey* v. *Mallonee*, 332 U.S. 245, 256 (1947), we have a case where the agency head finally resolved the merits of a case before the matter was heard by his subordinates. Accardi never had an opportunity to meet the

charge that he was a racketeer. He was never aware of the charge until the Department of Justice press release of April 3, 1953. No presumption of regularity noted in *Fahey* v. *Mallonee, supra,* applicable in advance that an administrative hearing will be fairly conducted, obtains here.

Mr. McGranery announced that he planned to deport 100 alien racketeers (R. 160). Thereafter he irrevocably decided *ex parte* that Accardi was a racketeer, included him within the program, and "moved to deport him" while the case was pending before the Board (R. 137, 141). This fact was then communicated by others *ex parte* and with great secrecy to the Board of Immigration Appeals (R. 109-110; 189, Finding 5) prior to its decision.

It is obvious from the documentary and other proofs herein, that a person within the program was an individual who was marked for deportation as this Court observed (347 U.S. at 267), as Mr. McGranery and Mr. Sexton admitted, and that the Board was advised of this fact. We must, therefore, reject the District Court's finding that notification to the Board was merely for the purpose of expediting the case.

IV

Ex Parte Notification to the Board that Accardi Was a Racketeer Violated Immigration Regulations and Due Process

This Court observed in the instant case that the immigration regulations have the force and effect of law, 347 U.S. at 265. We submit that when a confidential notice was sent to the Board that Accardi was a racketeer within the Attorney General's program, immigration regulations were violated.

(A) *The Immigration Regulations preclude consideration of matters outside the record.*

In *Alexiou* v. *McGrath*, 101 F. Supp. 421, 424 (Dist. of Col. 1951), the Court ruled as follows:

> "Once the Attorney General has established the procedure affording an opportunity for a fair hearing as has been done here, then I do not believe his discretion can be exercised arbitrarily or capriciously in complete disregard to what appears on the record. These proceedings were infected with unfairness by a consideration of matters outside the record. Any action based on such an unfair hearing is a nullity. If that were not so then we would be injecting into our own system of government the very principles of totalitarianism which we are today struggling to strike down." • • •
>
> "The hearing on eligibility for suspension is tainted, *ab initio*, with unfairness, because evidence not of record was considered. But for that evidence it is wholly speculative whether the requisite finding would have been made. See *Bridges* v. *Wixon, supra.* The charge of lack of due process cannot be avoided by a subsequent attempt at compartmentalization."

Deportation proceedings must be fair and consideration of *evidence* for discretionary relief is an integral part of the deportation hearing.

The administrative proceedings herein were instituted on October 21, 1947 (R. 182) and were therefore controlled by the Immigration Act of 1917 (8 U.S.C. 155-c-2) and the regulations promulgated thereunder (66 Stat. 280).

The regulations under the 1917 Immigration Act provided that the hearing officer should set forth in his opinion "a discussion of the *evidence* relating to the alien's eligibility for such relief (departure in lieu of deportation or

suspension of deportation) and of his reasons for his proposed order." 8 C.F.R. 150.7(b); 1949 ed. Under a 1950 amendment to the regulations, it was specifically provided that the hearing officer should "present *all available evidence* * * * concerning * * * statutory eligibility for discretionary relief" [8 C.F.R. 151.2(c); 1951 Supp.]. "If the alien has applied for relief from deportation, the decision (of the hearing officer) shall also contain a separate determination as to whether or not the hearing officer is satisfied, *on the basis of the evidence presented*, as to the alien's statutory eligibility for the relief requested" 8 C.F.R. 151.5 (a); 1951 Supp.

If the alien is not granted discretionary relief, he is deported. Ever since *Kwock Jan Fat* v. *White*, 253 U.S. 455 (1920), it has been held that only matters of record must be considered, if a deportation hearing is to avoid the charge of unfairness.

Moreover the courts have almost uniformly assumed that only matters of record can sway discretion in deportation hearings.

In *U. S. ex rel Weddeke* v. *Watkins*, 166 F. 2d 369 (C.A. 2, 1948; cert. denied 333 U.S. 876) it was said:

> "Since the regulations of the Attorney General have set up a quasi-judicial procedure for the determination of issues bearing on the propriety of exercising his power to suspend deportation under 8 U.S.C.A., section 155(c), we assume that the alien is entitled to procedural due process in the conduct of such hearing, and we assume further that, if the Immigration Service issues a warrant of deportation without according the alien such procedural due process, the warrant can be challenged on this ground in habeas corpus proceedings."

Arakas v. *Zimmerman*, 200 F. 2d 322, 324 (C.A. 3, 1952) states: "We agree entirely with the holding in *Alexiou* v. *McGrath*, D.C. 1951, 101 F. Supp. 421 * * * ".

In *U.S. ex rel Giacalone* v. *Miller*, 86 F. Supp. 655, 657 (S.D.N.Y. 1949), Judge Rifkind stated:

> " * * * It is now accepted that procedural due process must be observed in a hearing even though the alien is invoking relief which is, in any event afforded only at official discretion. See *United States ex rel. Weddeke* v. *Watkins*, 2 Cir. 1948, 166 F. 2d 369, 371, certiorari denied 1948, 333 U.S. 876, 68 S. Ct. 904, 92 L. Ed. 1152; *Kavadias* v. *Gross*, D.C.N.D. Ind. 1948, 82 F. Supp. 716, 718."

Kavadias v. *Cross*, 82 F. Supp. 716, (N. D. Ind. 1948; reversed upon other grounds, 177 F. 2d 497) followed the rule of *U. S. ex rel Weddeke* v. *Watkins*, *supra*, that discretion must be exercised upon the evidence of record.

See also: *Ex parte Chohan*, 122 F. Supp. 851 (N.D. Calif. 1954).

(B) *Congress did not authorize utilization of matters outside the record.*

In *U. S. ex rel Kaloudis* v. *Shaughnessy*, 180 F. 2d 489, 491 (C.A. 2, 1950) which did not involve matters outside the record, the Court observed that review of discretion was appropriate where its denial was "actuated by consideration that Congress could not have intended to make relevant."

Significantly, where Congress intended that matters outside the record be utilized it specifically authorized it or authorized regulations permitting its use. Such is the case of exclusions without a hearing. 8 U.S.C. 1225(c); *Knauff* v. *Shaughnessy*, 338 U. S. 53 (1950); *Shaughnessy* v. *Mezei*, 345 U.S. 206 (1953). Such is the case of detention of alien

enemies who are not entitled to a hearing. *Ludecke* v. *Watkins*, 335 U. S. 160 (1948). However, where a hearing is authorized—and this is so even in the case of arriving aliens, it must be a fair hearing on record evidence. *Johnson* v. *Tertzag*, 2 F. 2d 40, 42 (C. A. 1, 1924); *U. S. ex rel., Brandt* v. *District Director*, 40 F. Supp. 371 (S. D. N. Y. 1941); Immigration and Naturalization Service *Monthly Review*, February, 1947, p. 101.

(C) *The Board considered matters outside the record.*

The District Court found that the Board was notified that Accardi was within the Attorney General's program (R. 189, Finding 5). The Board was, therefore, notified *ex parte* and outside the record that Accardi was a "top racketeer." It is not only improbable, but highly incredible that such notification from the Attorney General to a subordinate would not affect his exercise of discretion.

As observed by Judge Frank, "Any other finding involves reliance on so remarkable a degree of improbability as to be untenable" (R. 201). After reading newspaper accounts, the Board, unsolicited by direct communication from the Attorney General, consented to receive confidential reports as to program cases, to conform to the Attorney General's announced purposes (R. 106-110). It claimed impartiality in the instant case upon the rejected ground that it was not aware of the Accardi listing (R. 127; 189, Finding 5) and the discredited assertion that the program's aim was solely expedition.

It is only if the Attorney General's program was one solely to expedite and if the notification to the Board could be construed as a simple and pure request to expedite cases that any contrary conclusion could be reached. The documentary evidence and human nature point the other way.

It is for this reason that Chief Judge Clark in the Court below observed (R. 214):

> "The facts shown create a presumption of bias not overcome by the Board's self-serving declaration to the contrary. This would be so whether the program was one of expedition or one of deportation, *for in either case, relator was being singled out as an alien whose imminent deportation was deemed desirable by the Attorney General.*" (Italics supplied).

V

The Evidence Clearly Establishes that Respondent Was Denied Due Process Before the Board

On April 3, 1953, the Board of Immigration Appeals stated as follows with reference to relator (R. 183):

> "Affidavits of persons well acquainted with the alien, *character investigation by the Service*, and the testimony of four witnesses placed in this proceeding *establish that the alien is considered a person of good moral character.* (Emphasis supplied.)

The Board's Chairman admitted that there was no record evidence before him indicating that Accardi was a racketeer (R. 121).

The Department of Justice, however, does not consider the respondent a person of good moral character, but on the contrary have been free in describing him as a "nationally known racketeer" and "hoodlum" (R. 159). (Significantly, petitioner's name will not be found in the Kefauver Report, *Senate Report 307*, 82d Cong. 1st Sess.)

Professor Konvitz, in his recent book, *Civil Rights in Immigration*, (1953) observes: "That there are special drives against these persons (the foreign born) ought to be apparent to anyone who reads the newspapers" (p. 110).

Professor Konvitz properly notes that "in the long run these drives against aliens and foreign born citizens have an evil effect upon the administration of justice" *Civil Rights in Immigration, supra*, p. 125. William Shannon, in his series of articles which began in the New York Post on October 19, 1953 states in the same vein:

> "Almost every day Attorney General Brownell announces the deportation of some alleged subversive or underworld figure. This great 'cleanup drive'—it began before the Republicans took over, but they really went to town with it—seems likely to chalk up a higher box score than that of A. Mitchell Palmer during the 'red scare' days of 1919-20.
>
> "When the clatter of the mimeograph machines in Brownell's busy press office occasionally quiets down, however, it becomes clear that many innocent persons, some of the humble and friendless, have been trapped in Brownell's legal machinery."

Joseph Accardi was and is, in fact, a person of good moral character as found by the Board of Immigration Appeals. He never was a racketeer. He is one of the innocents caught in a deportation drive. The anxiety of the Department of Justice to deport a racketeer made petitioner the object of a grand hoax.[1]

This deportation drive of the Attorney General should be reviewed in the light of the applicable regulations and pertinent provisions of law.

Regulations having the force and effect of law *Accardi*

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[1] On April 27, 1953 the New York Times prematurely reported that Joseph Accardi was the first racketeer deported under the current deportation drive, and on September 23, 1953 Drew Pearson criticized the Department of Justice because it had only deported two criminals out of 133 in eight months.

v. *Shaughnessy*, 347 U. S. at 265 grant an alien a hearing before the Board of Immigration Appeals. 8 C. F. R. 90.3 and 90.5 (1949 Ed.) Violation of such regulations violates due process. *Accardi* v. *Shaughnessy, supra; Bridges* v. *Wixon*, 326 U. S. 135 (1945).

The hearing contemplated by the law and the regulations is a fair hearing upon the record. *Kwock Jan Fat* v. *White*, 253 U.S. 455 (1920); *Bridges* v. *Wixon*, 326 U.S. 135 (1945). In administrative hearings, the liberty of individuals should be "protected by the rudimentary requirements of fair play. These demand 'a fair and open hearing' . . . . Such a hearing has been described as an 'inexorable safeguard.' " *Morgan* v. *United States*, 304 U. S. 1, 14, 15 (1937). And in this connection, it should be observed, that the "fact that a judgment may be justified on the merits does not obviate the requirement of a fair hearing." *National Labor Relations Board* v. *Bryan Mfg. Co.*, 196 F. 2d 477, 478 (C. A. 7, 1952); *Montgomery Ward & Co.* v. *National Labor Relations Board*, 103 F. 2d 147, 149 (C. A. 8, 1939) *Sung* v. *McGrath*, 339 U. S. 33 (1950).

> ". . . for a fair trial by an unbiased and non-partisan trier of the facts is of the essence of the adjudicatory process as well when the judgment is done in an administrative proceeding by an administrative functionary as when it is done in a court by a judge. Indeed, if there is any difference, the rigidity of the requirement that the trier be impartial and unconcerned in the result applies more strictly to an administrative adjudication where many of the safeguards which have been thrown around court proceedings have, in the interest of expedition and a supposed administrative efficiency been relaxed." *National Labor Relations Board* v. *Phelps*, 136 F. 2d, 562, 563 (C.A. 5, 1943). See

also *In re K-3 Pike and Fischer*, Administrative Law (2d) 668 (1952).

In the instant case, the Attorney General disturbed the Board's impartial consideration of the Accardi case:

1. By public announcement of a program to deport which program came to the Board's attention during its deliberations on the Accardi case;

2. By creating a program to deport with named individuals, including Accardi, listed therein prior to the Board's final determination of a case;

3. By communication to the Board that the case was within the program. Admittedly, inclusion within the Attorney General's program, was an indication that a case was not meritorious. On the contrary, "obviously, all aliens within the Attorney General's program have some unfavorable or unsavory factors in their backgrounds which would make it more difficult for them to establish the type of merit which would warrant the granting of discretionary relief." (R. 26). A case marked "Attorney General's list" therefore necessarily conveyed more than just a request for expedition. It was a request to note that the case had a bad background combined with a request to expedite—at minimum, if not a request to deport. And this request was admittedly made *ex parte*. In the instant case, it was a notification that Accardi was a "top racketeer."

If a civil non-jury judge subject to the Attorney General's pleasure for tenure, as are the Board members, were to secretly receive advice as to whether the defendant was a racketeer from the Attorney General in every case before rendering his decision, could it be said that an open and fair trial was granted?

That is precisely the instant situation. The Attorney General determined secretly that Accardi was a racketeer, placed him within his program and secretly moved to deport him (R. 141). The inclusion of Accardi within the program was secretly conveyed to the Board (R. 64, 110). The Board was thereby fully aware, whether the notification be taken at its face value as notice of listing within the program, or contrary to its language as a mere request to expedite, that Accardi's case was not considered meritorious by the Attorney General and that he was a "top racketeer."

Had the Attorney General acted in this fashion—had he issued press releases about a program and included a pending jury case within the program—there can be no doubt that it would be held that there was inference with the functions of the jury. *Delaney* v. *United States*, 199 F. 2d 107 (C.A. 1, 1952). As in the *Delaney* case, an atmosphere was created here, by the Department of Justice itself, which prevented fair, open and impartial consideration. The Supreme Court recently noted: "A juror must feel free to exercise his functions without the F.B.I. or anyone else looking over his shoulder" *Remmer* v. *United States*, 347 U.S. 227, 229 (1954).

See also: *United States* v. *Florio*, 13 F.R.D. 296 (S.D.N.Y., 1952).

The Board, created to act impartially and exercise its independent judgment, should likewise have felt free to exercise its functions without the Attorney General's listing staring over its shoulder. The fact that the Attorney General was the Board's superior, only made his conduct more persuasive upon the Board's decisions. His press releases, his listing of Accardi while the case was pending before the Board, and the advice to the Board that Accardi was on the list—all necessarily had a prejudicial effect upon the Board—even as they would have had upon a jury.

> "In a criminal case, any private communication, contact, or tampering, directly or indirectly, with a juror during a trial about the matter pending before the jury is, for obvious reasons deemed presumptively prejudicial if not made in pursuance of known rules of the court and the instructions and directions of the court made during the trial, with full knowledge of the parties. The presumption is not conclusive, but the burden rests heavily upon the Government to establish, after notice to and hearing of the defendant, that such contact with the juror was harmless to the defendant." *Remmer* v. *United States, supra.*

Can it be said that the Board would have decided the case in the same manner had Accardi not been on the Attorney General's list? Has the Government conclusively established that fact—when it is noted that in no program case had the Board ever granted an alien permission to remain permanently? (R. 120). It is pure speculation at this late date to ascertain how the Board would have decided the case had it acted without the Attorney General's listing of Accardi and the Attorney General's program as announced in the press. In view of the fact that most Board members had no specific recollection of the Board conference on the Accardi case or whether the case was listed, (R. 69, 70) it is now impossible to determine the exact impact that the program and listing had upon them.

But, in accordance with the *Delaney* and *Remmer* cases, the public releases relative to the program created an atmosphere of prejudice, and the private communication of listing of an "unsavory character" presumptively created prejudice likewise and therefore interfered with the open due process hearing to which relator was entitled. Justification of the administrative judgment on the merits, more-

over, does not obviate the necessity of a fair hearing. *National Labor Relations Board* v. *Bryan Mfg. supra.*

We submit therefore that upon Mr. McGranery's testimoney and the press releases herein—the case was in fact prejudged. But if it was not, such prejudice was thereby created herein, as to render the hearing unfair.

CONCLUSION

The documentary proof herein as well as Mr. McGranery's testimony and this Court's previous decision herein establish that there was a program to deport. Mr. Horan's testimony of the complicated machinery and processing of a case within the Attorney General's program make it seem incredible that all this effort and manpower were utilized merely to place a case within the program to secure expedition. Added to this is the secretive manner in which notifications were sent to the Board that a case was within the program.

The sole source of the Board's knowledge of the program at the time of its decision in the instant case were press releases and newspaper accounts which clearly reflected a program to rid the nation of alleged undesirable aliens. The Board members failed to disclose how they could have formed any contrary impression of the program as reasonable men reading such accounts.

The Board was aware of the program. It was aware that a case within the program either had a black mark against it—or was marked for deportation. At least one member knew the case was within the program. The others merely have no present recollection. But a system was in force to notify them prior to their decision and the press release of April 3, 1953, announced that Accardi was deported pursuant to the program. Prejudgment and prejudice interfering with due process before the Board are conclusively established upon this record.

Purge lists are too reminiscent of the totalitarian tactics

of the abhorred Nazis and Communists. Programs to vigorously enforce our immigration laws are one thing. Programs to deport listed aliens in advance of full consideration of their cases is quite another. There is no place in our way of life for proscribing individuals for deportation and exile before their cases are finally decided upon record evidence.

If the fate of the respondent alone were to be decided by this case, it would be of small moment. Hysteria impels people to destroy the very thing they are struggling to preserve. The hysteria whipped up by the Department of Justice in this case, should not permit us to lose sight of the democratic way that administrative agencies should function. The power of the Attorney General over resident aliens

> "is the power to be administered, not arbitrarily or *secretly*, but fairly and openly under the restraints and principles of free government applicable where the fundamental rights of men are involved, regardless of their origins or race. It is the province of the courts, in proceedings for review * * * to prevent abuse of this extraordinary power, * * * " *Kwock Jan Fat* v. *White*, 253 U.S. 454, 464 (1920).

To prevent abuse of the Attorney General's extraordinary powers over the lives and destinies of our foreign born, judicial intervention is appropriate herein.

A just and proper result has been reached below by appropriate evaluation of the documentary and other proofs. The judgment below should therefore be affirmed.

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